

Shaw Creek-NEPA

Pending Biologist Site Inspection of Shaw Creek - Oct 22, 2014

Background information

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Shaw Creek

Shaw Creek is a side channel to Wide Hollow Creek. The true name is “Shaw Creek” (not Shaw Ditch, Shaw Creek/Ditch, other). There is a watershed of greater than six square miles. Aerial photos show that the natural course of the stream was northwest to southeast. Channel threads of Wide Hollow Creek and Shaw Creek met in the center of the valley floor (see 1947 aerial photo). In the early 20th century, the stream channel was diverted to the existing location along the north portion of the floor of the West Valley. One party was granted irrigation water rights; these water rights are still valid and are used on a residential parcel. One party possesses riparian water rights for a fish pond. There is no party using Shaw Creek water for commercial irrigation.

Historically, Shaw Creek was habitat for Bull Trout and Steelhead. Spawning runs of salmon and steelhead used Wide Hollow Creek and Shaw Creek. There is an abundance of evidence documented in the literature regarding these two federal endangered species (i.e. Federal Endangered Species List). Other fish documented within Shaw Creek are Speckled Dace, Trout, and other minnows. During the 21st century, observations of

stream waters and pools (between the Radke parcel and Cottonwood Grove) have affirmed the presence of fish within Shaw Creek. The current DNR stream classification would be an F-Stream (fish-bearing stream). The previous DNR stream classification would be a Type 3 stream.

The waters of Shaw Creek are from surface water runoff and ground water flows. In addition, there is augmentation of flows from irrigation runoff. It must be clearly understood that the existing Shaw Creek watercourse is not an irrigation ditch. The existing watercourse contains the natural flows of Shaw Creek.

The watershed contains orchard trees and other agricultural lands. Legacy orchard blocks were sprayed with lead arsenic during the first half of the 20th century. It is known that arsenic was sprayed at a rate of 25-45 kg per acre for about 50 years; there may be over a ton of arsenic per acre. It is known that runoff from arsenic laden soils contains arsenic in the water, so there is a significant concern that arsenic is contained in the waters of Shaw Creek. In addition, high levels of fecal E. coli bacteria have been measured in Shaw Creek representing contamination with sewage water.

Flooding

Sheet flooding from Shaw Creek has been observed during wintertime rain events and sudden snow melts. Despite clear evidence of flooding, the Cottonwood Grove Subdivision was allowed to be built (allowed by the City of Yakima) in known areas of flooding. During the last couple of years, FEMA has formally charted the Shaw Creek FEMA 100-year Floodplain within the valley floor (of the West Valley).

There are plans to rapidly expand roadways and utilities into the Shaw Creek FEMA 100-year Floodplain. After the utilities are placed, it is well documented that developers plan to construct 1000 new homes within the floor of the West Valley in land that is currently floodplain. In order to completely eliminate the Shaw Creek FEMA 100-year Floodplain from the maps, a flood channel or swale is being proposed and funded using a federal grant.

In addition to surface water flooding, there are significant ground water problems. Excavations within the floor of the West Valley have consistently demonstrated that the subsurface aquifer is located just 24-48 inches below the surface. At times, these levels diminish to the point that crawl spaces become completely flooded under existing homes. High volume pumps are required to pump out the crawl spaces.

Development

There are various development plans that are evolving for the land within the Shaw Creek FEMA 100-year Floodplain. Ordinarily it would be illegal to contemplate the use of federal funds to eliminate a FEMA 100-year Floodplain (see EO 11988). Somehow, local Planning Officials feel they can circumvent environmental protections and proceed with construction of a drainage swale without providing critical areas. And once the drainage swale is excavated, the Shaw Creek FEMA 100-year Floodplain will be eliminated from the maps. At that point there will be rapid urban development resulting in a thousand homes on land that was previously charted and protected FEMA Floodplain.

Another area of development, the Bainter B-2 commercial development, exists along the current Shaw Creek watercourse. Various parcels are involved including Bainter land and land owned by Mr. Radke along Shaw Creek (both the Radke and Bainter B-2 parcels are known as the “Bainter B-2 commercial zone”). Along the Radke portion of Shaw Creek, this man wished to create an auto modification operation with the storage of dead cars (over 50) along the stream. The City of Yakima permitted Radke to operate this illegal business for several years without permits, but legal action eventually forced the City to close the illegal business. However, the City of Yakima did issue to Mr. Radke a written document that allows him to mow all vegetation up to the high water mark of the stream (Shaw Creek). When members of the public have indicated that the mowing of all vegetation within protected critical areas is a violation of YMC 15.27 (the critical areas ordinances), the City has responded by saying that the destruction of vegetation is just a “minor alteration”. So the reason why there is no protected Riparian Buffer Zone along the Radke portion of Shaw Creek is the failure of the City of Yakima to protect critical areas. Under the trees on the Radke portion of Shaw Creek are pools that have contained fish.

The Bainter portion of Shaw Creek also has had critical area destruction. In 2012, Mr. Bainter illegally diverted and relocated the waters of Shaw Creek to a new watercourse; he did not possess the required permits. The City of Yakima (Mr. Jeff Peters) was given notice of the pending destruction of Shaw Creek in advance of the illegal diversion but did not take actions to stop the critical area violation. There has been no action taken by the City of Yakima to abate the illegal ditch (Illegal-Bainter-Ditch) and restore the waters to the legal watercourse. At the time of the illegal diversion of Shaw Creek, Mr. Bainter

also applied tons and tons of illegal fill to the legal watercourse, wetlands, Riparian Buffer Zone, and the Shaw Creek FEMA 100-year Floodplain. The purpose of applying the illegal fill was to expand the B-2 commercial zone and to simplify future excavations through the destroyed wetlands (now under tons and tons of fill). The City of Yakima has taken no action to restore the damage done to the legal watercourse, wetlands, Riparian Buffer Zone, and Floodplain. Since 2012 when Mr. Bainter destroyed the legal watercourse of Shaw Creek, Mr. Bainter has illegally mowed all vegetation up to the high water mark; this mowing has occurred within the Shaw Creek FEMA 100-year Floodplain and within the Riparian Buffer Zone. For this reason, there is an absence of native vegetation within the Shaw Creek FEMA 100-year Floodplain.

There is an evolving set of conditions at the Bainter site. On October 7, 2014, Mr. Bainter planted a handful of seedlings along the Illegal-Bainter-Ditch. Previously there was no native vegetation; the area only contained pasture grass and a variety of invasive weeds. Apparently a private agreement was reached between Mr. Peters and Mr. Bainter so that a few seedlings would be planted near the illegal watercourse. And there are future plans for Mr. Bainter to submit proof to Mr. Peters that the casting of grass seeds, then covering with tons of rock, will further mitigate critical impacts at the Bainter site. Needless to say, the “seed proof document” represents an absurd and irrational concept by Mr. Peters and Mr. Bainter.

Mr. Bainter has currently submitted project plans to excavate a short trench (50-100) feet under the Illegal-Bainter-Ditch, bury a stub of pipe, and then construct long utility roadways covered with rock. These plans have been approved by Mr. Jeff Peters (City of

Yakima); a Critical Area and Floodplain Development Permit has been issued to Mr. Bainter. When Mr. Bainter constructs the long utility roadways through the Shaw Creek FEMA 100-year Floodplain, across the legal watercourse of Shaw Creek, and fording the Illegal-Bainter-Ditch, the landscape will change again. Given the vicissitudes of Mr. Jeff Peters, it cannot be predicted as to what the real plans and real project will be. There may or may not be native vegetation. There may or may not be pasture grass. Perhaps there will really be native grass. There may be extensive rock filling within the Shaw Creek FEMA 100-year Floodplain.

Applicable Laws

Significant federal laws including the Endangered Species Act and the Clean Water Act have bearing on Shaw Creek. In addition, recent litigation has resulted in application of the Biological Opinion (integrating ESA with FEMA) that impacts Shaw Creek. For Shaw Creek, the BioOp mandates a Riparian Buffer Zone of 150 feet from the high water mark of the legal watercourse. And the hyporheic zone at 24 inches may not be disrupted. Clearly, it is a violation of the CWA to relocate Shaw Creek and to fill the legal watercourse. Numerous portions of YMC 15.27 (Yakima Critical Areas Ordinances) have been violated. However, the City of Yakima does not enforce any portion of YMC 15.27 at the Bainter site; this is the reason that critical areas are currently destroyed and not restored. There is pending legal action involving the City of Yakima and Mr. Bainter. Laws indicate that the City and Bainter are to pay for restoration of the destroyed critical areas. When restoration occurs, the entire Shaw Creek stream corridor (legal watercourse and federally protected Riparian Buffer Zone) could radically change.

In addition, legal action is pending regarding Shaw Creek-NEPA. No flood control swale will be allowed until issues related to EO 11988 are resolved. Other concerns are: hyporheic zone disruption; the shallow subsurface aquifer; the absence of critical area protections and restoration; the complete elimination of the Shaw Creek FEMA 100-year Floodplain; corruption of procedures including predeterminations by Mr. Jeff Peters. There is very little chance that Shaw Creek-NEPA will proceed on schedule without significant effort placed on these core issues.

Restoration, Fines, Litigation

The City of Yakima has demonstrated a complete disregard for the protection of critical areas along Shaw Creek. The combined efforts of Mr. Jeff Peters and Mr. Bainter have led to destruction of Shaw Creek, destruction of wetlands, destruction of the federally protected Riparian Buffer Zone, and destruction of portions of the Shaw Creek FEMA 100-year Floodplain. Materials are being prepared for the Growth Management Hearing Board to address the systemic failure of the City of Yakima to enforce critical area protections as mandated by the GMA. CWA litigation is pending as a result of EPA/DOJ notification; if necessary a citizen lawsuit will occur. A review of falsified JARPAs is pending by U.S. district prosecutors. A LUPA review resulting in a B-2 to R-1 reversal is also pending. For Mr. Bainter and the City of Yakima, there could be fines resulting from CWA litigation. Costs of critical area restoration are likely for both Bainter and the City. Flood damage within Cottonwood Grove could join both the City and Bainter in litigation. A defense before the Growth Management Hearing Board will prove costly. The loss of the FEMA flood control grant will cost several million dollars. The loss of

perhaps \$300 million of taxable real estate will be a significant loss for the City of Yakima.